this case. If it is subsequently held by the courts that no statute of limitation has begun to toll in favor of these earlier recorded tax deeds then the Suffolk County economy will be substantially destroyed.

Since appellant alleged in its Answer (R59-60), in the first instance that the interpretation placed upon §70 and §71 by the appellees would render the statutes unconstitutional and since the court of original jurisdiction sustained appellees' interpretation and that interpretation was sustained by the Court of Appeals of the State of New York, the conclusion is inexorable that the statutes, as interpreted, were found to be constitutional by the highest court of the State of New York. A review by this Court is therefore warranted.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved in this appeal are the Impairment of Obligations of Contracts clause of Article I, Section 10 of the U. S. Constitution, the Due Process clauses of the Fifth Amendment to the U. S. Constitution, the Due Process Clause of Article I, Section 6 of the New York Constitution and the Legislative Power clause of Article III, Section 1 of the New York Constitution.

The statutes involved are Sections 70 (as amended by Chapter 745, Laws 1959) and 71 of the SCTA.

Said constitutional provisions and statutory provisions are set forth in Appendix A.

QUESTIONS PRESENTED

Was Special Term's construction of Sections 70 (as amended in 1959) and 71 of the SCTA, by which it held the November 16, 1964 tax sale (and subsequently issued tax deed) void by reason of the omission of the word "arrears" from the 1964/65 tax bill forwarded to appellees on December 1, 1964, violative of appellant's rights

(1) under Article 1, Section 10 of the U. S. Constitution, as an impairment of the obligations of appellant's contract made with the Suffolk County Treasurer at the tax sale, when the Treasurer sold the subject property to appellant;

(2) under the Due Process Clauses of both the U. S. Constitution (Fifth Amendment) and the New York State Constitution (Article I, Section 6), in that appellant's vested property rights were taken from it without compensation;

(3) under the Legislative Power clause of Article III, Section 1 of the New York State Constitution, in that Special Term, by its construction of the subject statutes created legislation by judicial decree, usurping the legislative power of the Legislature, to the detriment of appellant's vested property rights to the subject real property.

Neither the Appellate Division nor the Court of Appeals, which affirmed without an opinion, expressly answered the foregoing questions, their sole holding was that the earlier tax sale (and deed) was void by reason of the omission of the word "arrears" from the subsequently issued 1964/65 tax bill.

STATEMENT

As to Question (1) above:

A contract resulted at the 11/16/64 tax sale between the Suffolk County Treasurer and the appellant when the Treasurer sold the subject property to appellant *(Wood v. Lovett,* 313 US 362, 369), at which time the rights of appellant became fixed (*Clarke v. Mayor of NYC,* 111 NY 621, 623-624), vesting in appellant property rights which could not be taken from it, without due process (*Post v. Cowan,* 236 AD, 2nd Dept. (NY) 26). The construction made by Special Term of the language of §71 SCTA, under which Special Term, retroactively reached back to void an earlier valid tax sale (11/16/64), by reason of the omission of an "arrears" stamp on the 1964/65 tax bill issued December 1, 1964, impaired the obligation of appellant's November 16, 1964 contract with the Suffolk County Treasurer.

There was no issue as to the statutory duty and the power of the Suffolk County Treasurer to sell the subject property for the nonpayment of the 1963/64 2nd half taxes. Being vested with the absolute power to sell, the Treasurer, having performed every duty imposed upon him by statute, made a valid sale. Once valid, the sale remained forever valid (*Mabie v. Fuller,* 255 NY 194, 200) and "no subsequent illegal acts, either of omission or commission, can in any manner invalidate" the sale, *(Hardman v. Bowen,* 39 NY 195, 200).

Any act, from whatever source originating, to which a state gives the force of law, is a law of the state within the meaning of the contract clause of the United States Constitution (*Williams v. Bruffy,* 96 US 176, 183; 24 L. Ed. 716). Therefore, §71 SCTA, as construed by Special Term, authorizes an act (the omission of an arrears stamp) which,

when performed should invalidate a previously valid contract. Therefore, this act, when performed, is a law of New York State impairing the obligation of appellant's contract with the Treasurer, and itself invalid under Article I, Section 10 of the United States Constitution.

Under the doctrine of *Wood v. Lovett, supra:*

> "...the execution of the State's deeds to the appellants constituted the execution of the consummation of a contract, the rights arising from which are *protected from impairment* by Article I, Section 10 of the Constitution;
>
> ...any substantial alteration, by subsequent legislation, of the rights of a purchaser at a tax sale, accruing to him under the laws in force at the time of his purchase, is void as impairing the obligation of contract." (p. 369, emphasis added)

It is no less of an impairment of the obligation of the tax sale contract, if the same result (divestiture of appellant's vested contract rights) is achieved by Special Term's construction of the language of existing statutes (post 1959 § 70 and §71 SCTA). If the New York Legislature had enacted § 71 as vesting the power in the Tax Receiver to impair the obligation of appellant's tax sale contract, that enactment would have been unconstitutional by itself. Nor is the result any different, if Special Term, by its own construction of an unstated Legislative intention, attempts to do what the Legislature itself could not do, to impair the obligation of appellant's previous valid contract.

In this connection, the purpose and meaning of the 1959 Legislative amendment to § 70 SCTA embraces the thrust of appellant's position which the lower courts overruled. Under

the pre 1959 § 70 SCTA, the Treasurer's power to contract at the tax sale was conditioned upon his filing with the Supervisor, before September 1st, "a complete list of all taxes and assessments in arrears." This, the New York Court of Appeals, in *Stebila v. Mitrany,* 21 NY 2d 930, construing *both* § 70 and § 71 SCTA held to mean that the list must include (1) unpaid taxes not yet sold; and (2) unredeemed sales. In *Stebila v. Mitrany, supra* the chain of events was (a) the Treasurer's omission from his list of the unpaid taxes not yet sold, which led to (b) the omission by the Supervisor of the "arrears" stamp on the following year's assessment roll, followed by (c) the Supervisor's omission of the "arrears" stamp from the subsequently issued tax bill.

It was this Treasurer's omission of a condition precedent to a valid tax sale that made the tax sale void in *Stebila v. Mitrany, supra,* decided upon the pre 1959 § 70 SCTA. It was as if the Treasurer had omitted to advertise the tax sale, as commanded by the SCTA--he failed to perform a condition precedent to the vesting in him of the power to sell, thus the tax sale was held to be void.

However, in the instant case, the New York Court of Appeals was called upon to construe a different § 70 than the one it construed in *Stebila.* That § 70 as amended in 1959, made it the obligation of the Treasurer to include on his list *only* unredeemed sales, omitting the previously legislated duty to include unpaid taxes not yet sold. The Legislature, in 1959, had deliberately acted to remove this condition precedent to the vesting in the Treasurer of the power to sell or contract to sell. Thus, the Treasurer's "list of all property sold...remaining unredeemed." was properly filed in the instant case and the Supervisor, referring to this Treasurer's list, properly omitted the "arrears" stamp from both the 1964/65 assessment roll and tax bill. Thus the November 16, 1964 tax sale was valid and

remained valid forever.

The legislative scheme of the SCTA which the New York Court of Appeals referred to in *Matter of Gould Realty Company,* 284 NY 540, 544, functioned perfectly in this case; in that the 1965/66, 1966/67 and 1967/68 tax bills and assessment rolls (R 27) all had the proper "arrears" stamps.

The crux of appellant's position is that, in the instant case, the Treasurer had performed every condition precedent imposed upon him before the power to contract to sell at the November 16, 1964 tax sale had vested in him. Having the power to contract and having contracted to sell the subject property at the November 16, 1964 tax sale, an executed contract resulted, the obligation of which could not be impaired without violating the United States Constitution. The strained judicial construction of §§70-71 of the lower courts which resulted in the impairment of the obligation of appellant's contract is unconstitutional.

As to Question (2) above:

The issue as to whether appellant's vested rights were taken from it, without compensation, by Special Term's divestitue of appellant's title under the tax deed is a simple one. That issue hinges on whether or not a valid sale had taken place at the earlier tax sale which vested those property rights in appellant. The answer is found in a simple test, under even the lower court's holding, as to the validity of the tax sale which is: if the subsequently issued 1964/65 tax bill, issued for a different year's taxes than the one for which the sale took place, had in fact contained the "arrears" stamp, the sale would have continued to remain valid, being valid in its creation.

Yet Special Term would have us believe that a *subsequent*

act (omission of the "arrears" stamp from the 1964/65 tax bill mailed 14 days after the already valid sale had taken place) could retroactively reach back and destroy the previously valid sale. All this is performed, Special Term would have us believe, not by Legislative enactment, but by a court's construction of what was legislative intent when the Legislature enacted §71 SCTA and amended §70 SCTA in 1959.

Where two possible interpretations of a statute are available, the court will accept that which avoids constitutional doubts (*Courtesy Sandwich Shop, Inc. v. Port of New York Authority*, 12 NY 2d 379, 389). Here, Special Term construed Legislative intent in the enactment of the SCTA as a whole, and §71 and §70 (as amended) to achieve a result that would destroy a perfectly valid tax sale, resulting in the divestiture of the vested property rights of the appellant. Such a construction by Special Term should not be looked upon with favor.

To anticipate appellees' presentation of their argument that they were deprived of their property without due process when their property was sold for nonpayment of the 1963/64 tax and the 1964/65 assessment roll and tax bill omitted the "arrears" stamp, one must look to the SCTA for Legislative intent as to what kind of notice they were entitled to, *after the tax sale*, in order that they would receive due process.

The answer is contained in §52 SCTA which spells out how, when and who is to serve appellees with a notice to redeem from a valid tax sale; — *who* — "the county treasurer"; *when* — "at least three months before the expiration of the thirty-six months allowed for the redemption of the real estate sold."; *how* — "under the terms prescribed by the real property tax law", which is by newspaper publication of a fixed frequency.

APPENDIX B

Judgment of the Court of Appeals of the State of New York Dated March 5, 1970

COURT OF APPEALS

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 5th day of March in the year of our Lord one thousand nine hundred and seventy, before the Judges of said Court.

WITNESS, The HON. STANLEY H. FULD,
Chief Judge, *Presiding*
RAYMOND J. CANNON, *Clerk.*

Remittitur March 5, 1970.

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2. No. 400. 69

William Rogers & ano., &c.,

Respondents,

vs.

Pact Realty Corp., & ors., &c.,

Appellants.

Be it Remembered, That on the 4th day of September in the year of our Lord one thousand nine hundred and sixty-nine, Pact Realty Corp. & ors., &c., the appellants in this cause, came here unto the Court of Appeals, by Moses Krivis, & ors., their attorneys, and filed in the said Court Notices of Appeal and

return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And William Rogers & ano.,&c., the respondents in said cause, afterwards appeared in said Court of Appeals by Elwood D. Hooper, their attorney.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Moses Krivis, of counsel for the appellant Pact Realty, and by Mr. Stanley S. Corwin, of counsel for the appellants Jacobs and County, submitted by the appellant Town, and argued by

Mr. William M. Johnson, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed, with costs, as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced

was incumbent upon the lower courts to so construe § 71, in order to give meaning to the amended § 70. This the lower courts did not do when they isolated § 71 from § 70, despite the fact that in every one of the "arrears" cases decided before the instant case, these same courts construed both § 70 and § 71 together. What this means is that the lower courts in the instant case have overruled the doctrine of *Stebila v. Mitrany, supra*, under which they held that *both* § 70 and § 71 had to be construed together. However, now that the Legislature has acted to change the requirements of § 70, by its 1959 amendment, these same lower courts, reject their previously determined position and hold that *only* § 71 is to be construed and that § 70 is to be rejected, as if its original enactment in 1929 and subsequent amendment by the Legislature in 1959 had no meaning whatsoever.

Did the Legislature intend a useless act in amending § 70 in 1959? The answer is no. The lower courts' holding in the instant case is to be found in only the attempt to divest appellant of its title, in favor of the appellees, come what may. This is error and should be reversed.

Special Term's empowering of the Receiver to create his own list of "arrears" (R 141) from which he is to seek the information needed to enable him to stamp "arrears" on future issued tax bills is the creation of legislation by judicial decree. Nothing in the SCTA empowers the Receiver to perform this function. The only list of arrears provided for by the SCTA is the Treasurer's list. Only the Supervisor is empowered to stamp "arrears" on the assessment roll (§ 70) and the tax bill (§ 71 and § 11), and not the Receiver, as construed by the lower courts. Under § 11 SCTA tax bills are "made by the Supervisor" and not by the Receiver.

The substitution of Special Term's own scheme for

collection of taxes, in defiance of the Legislative scheme, is violative of Article III Section 1 of the New York State Constitution. The following judicial constructions also violate the same Article III:

(1) Creation of an additional notice to redeem from a previous valid sale, to be given by the Receiver's stamping of "arrears" on the subsequently issued 1964/65 tax bill. Only the Legislature can legislate what is a notice to redeem and who, when and how it is to be given. Special Term's empowering of the Receiver to serve such a notice of redeem by stamping "arrears" on a tax bill violently clashes with Legislative intent as found throughout the SCTA.

(2) Special Term's substitution of its own definition of "arrears" as defined by Black's Law Dictionary, (R 142) clashes with the definition enacted by the Legislature in the amended § 70, which defines "arrears" as unredeemed sales. In § 71 the Legislature referred to "said arrears" in the first sentence. That could only refer to the definition contained in the preceeding § 70 which defined "arrears" as unredeemed sales.

(3) § 70 stands in *Pari Materia* with § 71 and since it, to the exclusion of every other SCTA section, referred to the *same subject,* "arrears", these sections should have been "construed with *reference to each other* so that effect may be given to all the provisions in each..." (*51 American Jurisprudence,* Section 312), which goes on to say that "statutes should be interpreted in connection with other tax legislation." AJ goes on to state in "313. A taxing statute, like others must be read as a whole, as it stands on the statute books at its applicable date.", citing *Pacific Co. v. Johnson,* 285 US 480, 76 L Ed 893. (Emphasis supplied)

What the lower courts did in *Stebila v. Mitrany, supra,* in

construing both §70 and §71 was right since both sections stand in *Pari Materia* to each other (and to every other SCTA section). However, what these same courts decided in the instant case is wrong since they isolated §71 from §70, as amended in 1959, and every other SCTA section. The lower courts construed §71 as if it were the only section in the SCTA, dealing with "arrears" departing from its own determination in *Matter of Gould Realty Co., supra,* that the SCTA "is a *complete* and *exclusive system* for the collection of taxes and assessments by sale in Suffolk County" (emphasis added). In effect, the Court of Appeals held here that §71 is *not a part* of the complete and exclusive system which is the SCTA, but that it stands alone, as if it had been enacted separately and apart from the rest of the SCTA. This also was creation of legislation by judicial decree, through construction.

CONCLUSION

For the reasons stated, the federal and state constitutional questions brought up by this appeal are substantial and of pressing importance to the public. Probable jurisdiction should be noted in this case so that the questions may be resolved after plenary consideration of the case on the merits.

Respectfully submitted,

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APPENDIX A
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

CONSTITUTION OF THE UNITED STATES

ARTICLE I, Sec. 10. Restrictions upon powers of states (first paragraph)

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts or grant any Title of Nobility.

AMENDMENT (V) Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise, infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTION OF THE STATE OF NEW YORK

ARTICLE I, Sec. 6 (last paragraph)

No person shall be deprived of life, liberty or property without due process of law.

§ 70. County treasurer to furnish supervisors with list of arrears. The county treasurer shall make a complete list of all taxes and assesments in arrears and shall file with each town supervisor, on or before the first day of September of each year, a list of all arrears of taxes and assessments on property in such town. All sales of property for nonpayment of taxes or assessments shall be considered arrears and be included in such list until the deed has been given as herein provided or until the property is foreclosed and notice hereof is received by the county treasurer as provided in section sixty-two thereof. The supervisor of each town shall thereupon place in a column provided therefor the word "arrears" after the description of each parcel of land as shown on the above mentioned list. (Added by Chapter 52, Laws of 1929, in effect March 18, 1929)

§ 71. Bill of Taxes to Show Arrears. There shall be a ruled column for arrears in every tax bill rendered for taxes for lots on which said arrears or assessments may be due, or may have been sold and are still redeemable, in which shall be written opposite the entry of the description of said lot or parcel of land "Arrears" and at the bottom of said bill shall be printed "Whenever any tax or assessment shall remain unpaid for six months from February first, the property will be sold to satisfy such arrears of taxes or assessments, and all taxes and assessments up to a day to be named in the advertisement of sale. The amount of arrears may be obtained from and paid to the county treasurer." (Added by Chapter 152, Laws of 1929, in effect March 18, 1929.)

§ 70. *County Treasurer to Furnish Supervisors with List of Arrears.* Following each tax sale the county treasurer shall make and shall file with each town supervisor, on or before the first

day of September of each year, a list of all property sold for unpaid taxes and assessments in such town remaining unredeemed. All sales of property for non-payment of taxes or assessments shall be considered arrears and be included in such list until the deed has been given as herein provided or until the property is foreclosed and notice hereof is received by the county treasurer as provided in section sixty-two thereof. The supervisor of each town shall thereupon place in a column provided therefor the word "arrears" after the description of each parcel of land as shown on the above mentioned list. (Added by Chapter 152, Laws of 1929, in effect March 18, 1929; amended by Chapter 745, Laws of 1959, in effect April 23, 1959)

§ *11. Extension of Taxes by Supervisor.* The supervisor of each town shall on or before the first day of December in each year extend or cause to be extended upon the assessment roll of the town the taxes, assessments or other charges to be levied and assessed against the taxable persons and property on said roll as fixed and determined by the board of supervisors or other competent authority; and the cost thereof shall be a town charge. Such extension shall be made in totals or items as shall be requisite to conform to the form of the assessment roll as prescribed by the board of supervisors as hereinbefore provided, and there shall be inserted in the roll a tabular statement of the total assessed valuation in each tax district, the amount of taxes and assessments to be raised and the tax rate therein. Such tabular statement shall also be printed or stamped in full upon the tax bills or on separate sheets as the board of supervisors may direct, and shall be distributed by the receiver to the taxpayers with the tax bills. In any town having one or more mechanical tax extension machines, the tax bills may be made by the supervisor at the time of extending taxes, assessments and other charges on the tax roll of the town. (Chapter 311, Laws of 1920, in effect April 22, 1920; amended by Chapter

104, Laws of 1921, in effect March 18, 1921; amended by Chapter 187, Laws of 1931, in effect March 20, 1931; and amended by Chapter 57, Laws of 1948, in effect March 1, 1948.)

§52. Notice of Unredeemed Real Estate: Notice to Redeem. 1. Notice of unredeemed real estate shall be given and published by the county treasurer at least three months before the expiration of the thirty-six months allowed for the redemption of real estate sold by him for taxes and assessments, the last publication to be at least six weeks before the expiration of such thirty-six months, and in all other respects shall be as provided in the real property tax law.

2. Whenever by any provision of the real property tax law it is provided that any notice may or shall be given or filed within a period measured by reference to the time allowed for the redemption of real estate sold for taxes and assessments or by reference to the time of the sale, such provisions shall be construed as referring to the thirty-six month period for redemption herein provided as respects such sales in Suffolk county. Notices required to be served upon occupants of real estate or other pursuant to the real property tax law in relation to the redemption of such real estate from tax sales shall state that such real estate may be redeemed upon the payment of the moneys specified by law to be paid upon the redemption of such real estate.

3. Notice shall be given by the purchaser of any real estate sold for taxes under the provisions of this act in the manner and under the terms prescribed by the real property tax law and notice to redeem from any such sale and notice to occupants shall be made and given as provided by such law. The provisions of the real property tax law relating to redemption shall continue to apply to the matters covered thereby, except as

herein otherwise provided, and except that the rate of interest to be paid upon any redemption shall be at the rates fixed by this act. (Added by Chapter 152, Laws of 1929, in effect March 18, 1929; amended by Chapter 960, Laws of 1958, in effect October 1, 1959.)

28 United States Code, Section 1257 (2)

Final judgment or decree rendered by the highest court of a State, in which a decision could be had, may be reviewed by the Supreme Court as follows:

(2) By Appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

As shown above, the tax sale was valid when made. A valid tax sale can not be wiped out, except by proper redemption. All that appellees were entitled to receive in the form of a redemption notice is specifically prescribed by §52 SCTA. Special Term, in the instant case, prescribed, by its own construction of §71 (out of context with the amended §70) and the rest of the SCTA, including §52, that appellees were entitled to an *additional* notice to redeem, in the form of an "arrears" stamp on the 1964/65 tax bill, which by §23 SCTA was required to be mailed and was mailed December 1, 1964, 14 days after the earlier, validly held tax sale.

Appellee's due process did not include an "arrears" stamp on the 1964/65 tax bill, in the face of the 1959 amendment to §70 which precluded the inclusion in the Treasurer's list of the unpaid 1963/64 tax which had not yet been sold, on September 1, 1964, (before the sale) at which time §70 mandated the Treasurer to furnish a list of unredeemed sales to the Supervisor of Babylon.

As to Question (3) above:

The power to enact legislation rests with the New York Legislature. Courts cannot, under the guise of judicial construction, create legislation. Yet, that is exactly what Special Term attempted to do herein.

The Legislature created, in the SCTA, "a complete and exclusive system for the collection of taxes and assessments by sale in Suffolk County" (*Matter of Gould Realty Co.*, 284 NY 540, 544). Before the 1959 amendment to §70, that system of collection of taxes provided:

(1) "COUNTY TREASURER TO FURNISH SUPERVISORS WITH LIST OF ARREARS", before September 1st, to include unpaid taxes not yet sold and unredeemed sales.

(2) Upon receiving that list, the "Supervisor...shall thereupon place in a column...(on the assessment roll-added)...the word "arrears" after the description of each parcel of land as shown on the..." Treasurer's list.

(3) Thereafter, the Supervisor (§ 11 SCTA), who makes up the tax bills (and not the Receiver, as claimed by Special Term) stamps "arrears" on the tax bill for the following year's taxes, which tax bill is to be mailed December 1st of that same year.

Under this Legislative scheme, had this tax sale been held before 1959, appellees would have been entitled to receive the later issued tax bill with the "arrears" stamp thereon *(Stebila v. Mitrany,* 21 NY 2d 930; *Erlwein v. Patchogue Homes,* 43 M2d (NY) 707; *Proschuk v. Erlwein,* 22 AD 2d 1018.) Under the pre 1959 § 70, a condition precedent to the vesting in the Treasurer of the power to sell was that he, the Treasurer, include by September 1st, before the sale, in his list filed with the Supervisor, the unpaid tax not yet sold. Thus, under the pre 1959 § 70, the power to sell might not have vested in the Treasurer, when he failed to include in his list the unpaid tax not yet sold, filed with the Supervisor before September 1st. That affected the due process to which the taxpayer was entitled.

However, in 1959, § 70 was amended by Chapter 745, Laws of 1959, to exclude from the Treasurer's list the unpaid tax not yet sold and to limit his list to include *only* unredeemed sales. The Legislature deliberately, in 1959, removed from a statutory duty previously imposed on the Treasurer, the obligation to include in his list unpaid taxes not yet sold.

Since the subject tax sale, destroyed by Special Term, took place after the enactment of the 1959 amendment to § 70; it

cording to law, and which record now remains in the said
preme Court, before the Justices thereof, &c.

s/ Raymond J. Cannon

Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office,

Albany, March 5, 1970.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

s/ Raymond J. Cannon

Clerk.

APPENDIX C
Memorandum Opinion of the Appellate Division Second Department

WILLIAM ROGERS, et al., Respondents, v. PACT REALTY CORP., et al., Appellants.—Judgment of the Supreme Court, Suffolk County, dated January 23, 1969, modified, on the law, by inserting in the second ordering paragraph, following the word "answers", the words "to the amended complaint"; and by adding a paragraph severing the cross-claims of defendant Pact Realty Corporation against the other defendants. As so modified, judgment affirmed, with one bill of $10 costs and disbursements to respondents, jointly against appellants filing separate briefs. In our opinion, the tax sale and the tax deed to defendant Pact Realty Corp., based on default in paying the second half of the 1963-64 taxes, were invalid because of the failure to have the word "Arrears" noted on the 1964-65 tax bill as required by section 71 of the Suffolk County Tax Act. (See *Hutch v. Platt,* 32 A D 2d 925.) The instant case does not involve the validity of a tax or assessment and the provisions of section 68 of the Suffolk County Tax Act are therefore inapplicable. We find no grounds for disturbing the Special Term's determination, except as herein modified, in any of defendants' other contentions. The judgment is modified to permit a determination of the cross claims, a question which was not presented to or decided by the Special Term. Christ, Acting P.J., Brennan, Rabin, Munder and Martuscello, JJ., concur.

APPENDIX D

Memorandum Opinion of Mr. Justice William R. Geiler Justice of the Supreme Court, Suffolk County, State of New York

MEMORANDUM
Motion No. 2748
Ind. No. 164, 335
9/3/68

SUPREME COURT, SUFFOLK COUNTY
SPECIAL TERM. PART I

WILLIAM ROGERS and ROSE ROGERS, his wife,

Plaintiffs,

vs.

PACT REALTY CORP., TOWN OF BABYLON OF THE STATE OF NEW YORK, CHESTER F. JACOBS, as County Treasurer of the COUNTY OF SUFFOLK, and the COUNTY OF SUFFOLK,

Defendants.

By GEILER J. S. C.
Dated November 25, 1968

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Motion by defendant Pact Realty Corp. (hereinafter referred to as Pact) for summary judgment dismissing the complaint and cross motion by plaintiffs for summary judgment.

Plaintiffs instituted this action pursuant to Article 15 of the Real Property Law of the State of New York, to set aside a tax deed executed and delivered by defendant Treasurer of the County of Suffolk (hereinafter referred to as Treasurer) to Pact.

Plaintiffs admittedly failed to pay the second half of the 1963/64 taxes on their property located in the Town of Babylon, County of Suffolk. Pact purchased the subject property at a tax sale on November 16, 1964. The property was not redeemed within the 36 month redemption period and the Treasurer delivered a tax deed to Pact on January 28, 1968. Pact recorded the deed on January 31, 1968.

The parties herein have stipulated to the following facts:

1. The tax bill for 1964/65 and the assessment roll for 1964/65 did not have the word "arrears" stamped thereon.

2. The "County Treasurer's Notice" was not printed on the bottom of the face side of the tax bills from 1963/64 through 1967/68 but was printed on the reverse side of said tax bills.

3. The "County Treasurer's Notice" provides:

> "Whenever any tax or assessment shall remain unpaid for six months from February First, the property will be sold to satisfy such arrears of taxes or assessments, and all taxes and assessments up to a day to be named in the

advertisement of sale. The amount of arrears may be obtained from and paid to the County Treasurer."

4. All of the above mentioned tax bills did not have a ruled column for arrears printed thereon.

Plaintiffs contend that the tax sale herein was void because the provisions of Section 71 of the Suffolk County Tax Act (hereinafter referred to as S.C.T.A.) were not strictly complied with by the taxing authorities. They especially argue that Section 71 of the S.C.T.A. required that arrears be noted on the 1964/65 tax bill and that the "County Treasurer's Notice" must be printed on the bottom of the front side of the tax bill.

Pact maintains that the plaintiffs have given an erroneous interpretation to Section 70 of the S.C.T.A. and therefore their contentions are without merit. The tax sale purchaser specifically asserts that the word "arrears" was not required to be noted on the 1964/65 tax bill because of the "operation of Section 70 of the S.C.T.A. as amended in 1959." Pact also argues that the printing of the "County Treasurer's Notice" on the bottom of the reverse side of the tax bill complies with the the requirements of Section 71 of the S.C.T.A.

Furthermore, Pact contends that plaintiffs' action is barred by the Statute of Limitations as contained in Section 63 of the S.C.T.A.

Section 71 of the S.C.T.A. provides:

"SEC. 71. BILL OF TAXES TO SHOW ARREARS.
There shall be a ruled column for arrears in every tax bill rendered for taxes for lots on which said arrears or assessments may be due, or may have been sold and are still redeemable, in which shall be written opposite the entry of the description of said lot or parcel of land

"Arrears" and at the bottom of said bill printed "Whenever any tax or assessment shall remain unpaid for six months from February First, the property will be sold to satisfy such arrears of taxes or assessments, and all taxes and assessments up to a day to be named in the advertisement of sale. The amount of arrears may be obtained from and paid to the County Treasurer."

What was the purpose of the Legislature in enacting Section 71 of the S.C.T.A.? Why did they so minutely describe what must be contained in each tax bill? Why is the tax bill so important?

The tax bill is the only actual or personal notice a property owner receives with reference to the taxable status of his property in Suffolk County. He will receive no other notice of the taxable status of his property unless the property is to be sold for unpaid taxes due thereon. Then the only notice he receives is that of the sale and this notice is not given personally but only by publication as prescribed by Sections 42 and 43 of the S.C.T.A.

The Legislature, cognizant of these facts, wanted to make certain that the property owner was made aware of any possible loss of his property because of unpaid taxes. They wanted this notice to be given in such a manner so as to alert not only the knowledgeable but also the uninformed property owner.

What was the best way to accomplish their purpose? How could they make even the most unsuspecting property owner aware of any tax monies due and owing?

The Legislature came to the conclusion that their purpose could best be achieved by mandating the format of the tax bill which every property owner receives. They therefore

determined that the front of all tax bills in Suffolk County should contain certain items from which a property owner, regardless of his knowledgeability of real estate taxes, could determine, at a glance, if there were any tax arrears and the title of the County official from whom the property owner could obtain such vital information. Hence, Section 71 was enacted and has not been amended to date.

The 1963/64 tax bill admittedly does not conform to the exact provisions of Section 71 of the S.C.T.A. Must there be strict compliance with Section 71? Is the failure to follow Section 71 fatal to a tax sale?

These questions were clearly answered by Justice Glickman of this Court in the case of *Stebila v. Mitrany*, N.Y.L.J., December 24, 1965, P. 10 Col. 5, affirmed by the Court of Appeals 21 N.Y.2d 930, in the following language:

> "The Court is satisfied from the facts disclosed in the papers that plaintiffs were afforded adequate notice and opportunity to make timely payments of the arrears and thus avoid the issuance by the County Treasurer of the deed which is the subject of this action. However, sympathetic as the Court is to the contentions of defendant, it is constrained to hold that the failure to note 'arrears' on the tax bill of 1958-1959 is sufficient in law to invalidate the tax sale and tax deed. In reaching this conclusion, the Court is guided by decisional law contained in the case of Ierna v. Maranzano, 211 N.Y.S.2d 616, Erlwein v. Patchogué Homes Corp., 43 Misc.2d 707, 252 N.Y.S.2d 220 and Proschieck v. Erlwein, N.Y.L.J. 7/31/64, p. 8 col. 5, Aff'd. 22 A.D.2d 1018, leave to appeal denied 15 N.Y.2d 486. In the last mentioned case, Justice Munder of this Court, in granting summary judgment declaring invalid a tax sale and deed for omission

of the word "Arrears" on a subsequent tax bill, held that the provisions of Section 70 and 71 of the Suffolk County Tax Act are mandatory and require strict compliance."

Pact maintains that neither *Stebila, supra,* nor the "arrears" cases cited therein are determinative of the issues herein because these cases were decided prior to the 1959 amendment of Section 70 S.C.T.A. The tax sale purchaser contends that Section 70 of the S.C.T.A., as amended in 1959, controls Section 71 S.C.T.A. and by its operation "arrears" was not required to be noted on the 1964/65 tax bill.

Section 70 of the S.C.T.A. as amended in 1959 reads as follows:

"§ 70. County treasurer to furnish supervisors with list of arrears. *Following each tax sale the* county treasurer shall make a [complete list of all taxes and assesments in arrears] and shall file with each town supervisor, on or before the first day of September of each year, a list of all [arrears] of *property sold for unpaid* taxes and assessments on property in such town *remaining unredeemed.* All sales of property for non-payment of taxes or assessments shall be considered arrears and be included in such list until the deed has been given as herein provided or until the property is foreclosed and notice hereof is received by the county treasurer as provided in section sixty-two thereof. The supervisor of each town shall thereupon place in a column provided therefor the word "arrears" after the description of each parcel of land as shown on the above mentioned list."

(NOTE: Changes or additions in text are indicated by *italics,* deletions by brackets).

Pact's position is based on the following syllogism:

1. Plaintiffs' property was sold in November, 1964.

2. The County Treasurer, by virtue of Section 70 S.C.T.A., was not required to file with the Town of Babylon a list, showing plaintiffs' property sold for unpaid taxes, until September 1, 1965.

3. Section 70 S.C.T.A. states that "all sales of property for non payment of such taxes or assessments shall be considered arrears." [Note this provision was also in Section 70 prior to 1959 Amendment]

4. The meaning of arrears is limited to property sold for non-payment of taxes.

5. Arrears did not exist until after the sale of plaintiffs' property.

6. The Town of Babylon did not receive the list of arrears (property sold for unpaid taxes) from the County Treasurer until after the tax bills for the year 1964/65 were sent out in December 1965.

7. Thus, "arrears" was not required to be noted on the 1964/65 tax bill.

Plaintiffs' position is untenable. It is based on a definition of "arrears" which has been refuted by Justice Ritchie of this Court in the case of *Erlwein v. Patchogue Homes Corp.*, 252 N.Y.S.2d 220, at page 223:

"*** the interpretation of the word "Arrears", as included

in the Suffolk County Tax Act means only those arrears that have been established by a sale of the property for unpaid taxes.

The Court does not agree with plaintiffs' contention."

What if no one purchased a particular piece of property offered at a tax sale because of non-payment of taxes? Does this mean, because the property is not sold, that there are no arrears? Doesn't the tax receiver, in the first instance, determine if there are arrears?

Thus it is clear that "arrears" was never intended to be limited to mean property sold for unpaid taxes. The only reasonable definition of "arrears" is its ordinary usage as defined in Black's Law Dictionary, 4th Edition, at page 140: "Money unpaid at due time."

This Court does not agree with Pact's contention that the Legislature modified or changed the mandatory provisions of Section 71 S.C.T.A. by the amendment to Section 70 S.C.T.A.

McKinney's Statutes, Section 73 states at page 110:

"The Constitution of this State vests the Legislative power in the Senate and Assembly and that the Courts may not divest or usurp that power has been announced so frequently and in such varying language to defy repetition. Thus it is said that courts may not make, change, amend, or repeal a statute, since their function is to interpret, declare and enforce the law, not to make it. No matter what disastrous consequences may result from following the expressed intent of the Legislature the Judiciary cannot avoid its duty*** They may not by interpretation add to or take from a clear and positive legislative mandate

or substitute that which must be brought into existence by legislative mandate***but public policy or opinion should not sway the judiciary to read into a statute that which the Legislature might have inserted but did not.***"

The Legislature had an opportunity to expressly change or modify Section 71 S.C.T.A. They chose not to do so. This Court will not change Section 71 S.C.T.A. by implication in view of the fact that the Legislature, if it intended to change Section 71 S.C.T.A.; refused to expressly modify or change the mandatory requirements of said section.

Furthermore, an examination of Sections 70 and 71 of the S.C.T.A. indicates that they accomplish two different and distinct purposes and neither section is repugnant to the other. The responsibility for the strict compliance with said sections lies with two different taxing authorities, namely the County and the Town respectively.

Section 391, McKinney's Statutes provides at Page 412:

"It is only where there is an irreconcilable conflict between the acts or where the subsequent act is clearly intended to supersede the former statute that a repeal by implication arises. To avoid a repeal by implication courts will narrowly construe a statute to keep it from conflicting with another, and when by a fair construction some office or function can be assigned to both acts, or they confer different powers for different purposes both must stand, though they were designed to operate on the same general subjects."

Defendants are also erroneous in their contention that plaintiffs' action is barred by Section 63 S.C.T.A. Section 63 basically provides that an action to attack the validity of an

assessment must be commenced within two years from the date of the receipt of the warrant by the receiver of taxes.

The plaintiffs are not attacking the validity of the assessment. They admit that the assessment is valid and thus Section 63 has no application herein.

The only section of the S.C.T.A. which is germane herein with reference to a statute of limitation period is 53. However, this action has been brought within the statutory period provided therein and therefore Section 53 is not an issue.

The Court abhors a forfeiture. It will not permit the plaintiffs, who have timely acted, to forfeit their real property because of the failure of the taxing authorities to comply with the provisions of Section 71 S.C.T.A.

The tax sale and deed are hereby declared invalid.

Plaintiffs' cross motion is granted and defendants' motion is denied.

Settle judgment.

WILLIAM R. GEILER

J. S. C.

APPENDIX E

Memorandum Amending Memorandum of November 25, 1968

MEMORANDUM

Motion No. 2748 9-3-68
Index No. 164, 335

SUPREME COURT, SUFFOLK COUNTY
SPECIAL TERM PART I

WILLIAM ROGERS and ROSE ROGERS, his wife,

Plaintiffs,

vs.

PACT REALTY CORP., TOWN OF BABYLON OF THE STATE OF NEW YORK, CHESTER F. JACOBS, as County Treasurer of the COUNTY OF SUFFOLK, and the COUNTY OF SUFFOLK,

Defendants.

By GEILER, J. S. C.
Dated January 13, 1969

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The Court, on its own motion, amends the decision dated November 25, 1968 to correct a typographical error on page 5 of the decision. The first sentence on page 5 shall read as follows:

"Pact's position is untenable..."

WILLIAM R. GEILER

J. S. C.